the mere instrument of damage, because there was no better person to hold. Therefore these cases furnish no inference of fault to controvert the argument of the preceding paragraph. Their theory is rather in support of the present plaintiff. Thus, if A causes B to become insane, and B, because of his insanity, damages C, then A is a better person to hold liable than B, since B is the mere instrument, while A is at fault. In the principal case the defendant is A, and the plaintiff stands in the position of both B and C, for the testator was used as an instrument to damage himself. It does not seem just to make the testator's bare instrumentality a bar to the action, and the plaintiff should therefore recover.

GRATUITOUS UNDERTAKINGS. — In personal actions the duty which is violated is generally one of two kinds. It may be one imposed upon the defendant in common with all the world, independently of any act or volition on part of the defendant, or it may be one which arises entirely from the defendant's promise, given formally or for good consideration. There is, however, in addition to these, at least one other way in which a legal duty may arise, that is, from a gratuitous undertaking by the defendant. Here it is a duty which the defendant without consideration has assumed voluntarily. It arises from some peculiar relation to the plaintiff, into which the defendant has entered.

The great bulk of these so-called "gratuitous undertakings" consists of the ordinary transactions of mandate. A mandate is defined as a consensual contract by which one party confides any transaction to another, who undertakes to perform it gratuitously.[1] A railroad, for instance, is held liable to a passenger whose contract was with a different road,[2] or who was being carried free under a misstatement as to his age,[3] or who had a pass as a stockholder.[4] This liability is imposed by law upon any one voluntarily assuming the relation of carrier to passenger. It is larger than the coexistent duty owed by the defendant to all the world, since it includes, for example, responsibility for the independent acts of servants,[5] or for hidden defects. An analogous instance of the same sort of liability is that owed to invited guests, where again the strict liability of the landlord depends upon his voluntary undertaking.

The most important class of cases dependent upon a gratuitous undertaking is probably that of gratuitous bailments. Formerly the courts attempted to construe a gratuitous bailment as a binding contract,[6] but lack of consideration makes that explanation untenable. In the case of a finder who picks up goods intending to return them to the owner, there is the additional objection of an absence of mutual assent.[7] In both these cases the bailee is liable to the bailor, and in both of them his duty arises from the relation into which he has voluntarily entered, not from a contract nor from

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[1] Williams *v.* Conger, 125 U. S. 422.
[2] Foulkes *v.* Met. District Ry. Co., 5 C. P. D. 157.
[3] Marshall *v.* Y. N. & B. Ry. Co., 11 C. B. 655.
[4] Phil. & Read. R. R. Co. *v.* Derby, 14 How. (U. S.) 468. *Cf.* Austin *v.* Great Western Ry. Co., L. R. 2 Q. B. 442.
[5] Croker *v.* Chicago, etc., Ry. Co., 36 Wis. 657; Putnam *v.* Broadway, etc., R. R. Co., 55 N. Y. 108.
[6] Riches *v.* Briggs, Yelv. 4; Hart *v.* Miles, 4 C. B. N. S. 371.
[7] Smith *v.* Nashua, etc., R. Co., 27 N. H. 86.

the mere fact of his existence. It is true the courts have laid down an arbitrary rule that a gratuitous bailee is liable only for gross negligence,[8] but by means of various subordinate rules of interpretation they have nearly reconciled this with the natural and as it seems more sound principle that the bailee should be required to exercise that degree of care which would seem reasonable from the character of the thing undertaken.[9] But whatever rule is applied to determine the extent of liability, the liability itself must arise from the act of the defendant in assuming such a relation.

The utility of the doctrine of undertakings is well illustrated by the case of *Shiells* v. *Blackburne*.[10] A customs officer who gratuitously undertook to enter some goods at the custom house, was held liable for performing it negligently. So, in a recent Canadian case the defendant, an insurance agent, agreed, without compensation, to place some additional insurance for the plaintiff, and notify the other companies of the increase. Through his neglect of this notification the plaintiff when the premises were burned was forced to settle at a loss. The court held that the defendant was liable for the loss. *Barber* v. *Jones*, 2 Can. L. Rev. 658 (September, 1903). In both these cases the duty violated arises from the relation assumed by the defendant, and his liability exists only because of his undertaking.

INSURANCE IN BENEFIT SOCIETIES. — Insurance on the co-operative or assessment plan has become the chief, instead of a subsidiary purpose of the Mutual Benefit Society. The courts accordingly treat such a society as merely another form of insurance company.[1] Alike in purpose, the two differ chiefly in this, that while the contract of the insured with the ordinary company is contained in the policy alone, only part of the contract of the member with the society is in the certificate of membership. The by-laws in force at the time are part of the contract, whether mentioned in the certificate or not.[2] Practically all such by-laws contain provisions for their amendment. In a recent Kansas case the plaintiff's dues were fixed by the by-laws of a mutual benefit association. An amendment materially increasing his monthly payment without his consent was held void as to him. *Miller* v. *Tuttle*, 73 Pac. Rep. 88. The case involves the question how far the society may amend its by-laws so as to increase the burdens or lessen the benefits of a member.

To make the question depend on the "reasonableness" of the amendment, as some courts have done,[3] is unsatisfactory. The rights of the member should be determined by deciding, from a fair construction of the contract, to what he agreed. To set up an arbitrary standard of reasonableness helps but little to the solution of the question. What effect, then, has the provision for amendment of the by-laws on the contract? As to this there is apparently a hopeless conflict. Some cases[4] seem to hold that the mem-

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[8] Coggs *v.* Bernard, 2 Ld. Raym. 909.

[9] For a full discussion of this point, see 5 HARV. L. REV. 222. Preston *v.* Prather, 137 U. S. 604; Shiells *v.* Blackburne, 1 H. Bl. 158; Gill *v.* Middleton, 105 Mass. 477; Siegrist *v.* Arnot, 10 Mo. App. 197.

[10] *Supra.*

[1] See cases collected in Niblack, Acc. Ins. & Ben. Soc. § 3, n.

[2] *Idem*, § 136, and cases cited.

[3] Weiler *v.* Eq. Aid Union, 92 Hun (N. Y.) 277.

[4] Cases collected in Morton *v.* Supreme Council, 73 S. W. 259.